Supreme Court, U.S.
FILED

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No.

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In The

Supreme Court of the United States

October Term, 1994

FRANCIS JOSEPH SMITH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Petition for Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether evidence of unusual or high electrical usage at a residence without any articulable objective indicia of criminal activity is sufficient to establish probable cause for issuance of a search warrant to search the residence.

PARTIES TO THE PROCEEDINGS

People of the State of Colorado

Francis Joseph Smith

Lawrence Douglas Dunkin

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THE PEOPLE OF THE STATE OF COLORADO,

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Colorado Court of Appeals issued on May 5, 1994, has been published and is cited as 888 P.2d 305 (Colo. App. 1994). The opinion appears in Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Colorado Court of Appeals issued on May 5, 1994, affirmed the decision of the trial court denying Petitioner's motion to suppress evidence seized pursuant to a search warrant and affirmed Petitioner's conviction and

sentence. A timely petition for rehearing was denied on July 7, 1994. A copy of the order denying the petition for rehearing appears in Appendix C. A timely petition to the Colorado Supreme Court for a writ of certiorari was denied on January 30, 1995. A copy of the order denying the petition for writ of certiorari appears in Appendix D. This court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

Petitioner was charged in the District Court for the Eleventh Judicial District of the State of Colorado with multiple marijuana offenses including cultivation of marijuana, cultivation of marijuana, unlawful possession of marijuana with intent to distribute, possession of more than eight ounces of marijuana, conspiracy to possess with intent to manufacture, dispense, sell, or distribute marijuana, and conspiracy to commit cultivation of marijuana.

The charges arose from the search by law enforcement officers of a residence owned by Petitioner at 4844 Park County Road, No. 43, on December 13, 1990. Lawrence Douglas Dunkin

was living at the house when the search warrant was executed. Dunkin was charged with the same offenses charged against Petitioner. The search was conducted pursuant to a search warrant issued upon the affidavit of Park County Sheriff's investigator, Charles Lindsey. A copy of the search warrant and affidavit appear in Appendix E.

The information in the affidavit included the following: (1) the "gut feeling" or "hunch" of Park County Sheriff's Deputy Haka that "something strange was going on at the house"; (2) observations by Sheriff's Deputies Haka and Daines of vehicles appearing at the residence in the morning and then leaving; (3) heavy curtains covering windows at the residence located in the high mountain country in December; (4) the uncertain opinion of officers that it appeared that no one was living at the residence; (5) information regarding the electrical usage at the residence for approximately fifteen months before the execution of the search warrant; and (6) the opinion of an investigator for the District Attorney's office that the information regarding the electrical usage raised the possibility of a marijuana growing operation.

Petitioner filed a motion to suppress any evidence obtained from the search of the residence. The motion specifically alleged that "The search pursuant to the search warrant violated Defendant Smith's rights against unreasonable searches and seizures guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution; Art. I, Sec. 7 and 25 of the Colorado State Constitution; Sec. 16-3-101 C.R.S. 1973 (as amended); Colo. Crim. P. Rule 42." The motion raised three primary issues: (1) violation of Petitioner's constitutional right of privacy in the utility records, (2) lack of probable cause in the affidavit for search warrant with or without the information from the utility records, and (3) material misstatements and omissions of fact that would make the affidavit substantially misleading and would be likely to alter the determination of probable cause to

issue the warrant. Petitioner filed two memorandum briefs that addressed all of the issues raised in the motion including lack of probable cause. The People filed no written response to the motion to suppress and offered no oral or written argument in the trial court.

The trial court issued a written order denying the motion to suppress. A copy of the trial court's written order appears in Appendix B. The court specifically addressed the arguments concerning Petitioner's claim of a reasonable expectation of privacy in the utility records and allegations of material misstatements and omissions in the affidavit. The trial court did not directly address the probable cause issue other than to state that "The remaining claims of the Defendants do not constitute sufficient cause for suppression of evidence." *See* Appendix B, p. 15a.

At a trial to the court on stipulated facts Petitioner was found guilty of cultivation of marijuana. Petitioner was granted probation with certain conditions including twenty days in the county jail. Petitioner was granted an appeal bond and execution of the sentence was suspended pending appeal.

On appeal to the Colorado Court of Appeals Petitioner raised each issue argued in the trial court including that the claim that there was insufficient probable cause in the affidavit to support the issuance of the search warrant. Section II of the argument portion of Petitioner's opening brief in the Colorado Court of Appeals stated the issue as "The affidavit for search warrant was insufficient to establish probable cause." The argument conduded by asserting that the ". . . trial court erred in rejecting Mr. Smith's claim that the affidavit failed to establish probable cause to search and denying the motion to suppress."

The Colorado Court of Appeals rejected each of Petitioner's

arguments. On the issue of lack of probable cause the Court held that, when read in a practical, common sense fashion, the affidavit in this case provided sufficient evidence to establish probable cause to search Petitioner's residence. *See* Appendix A, p. 10a.

The Colorado Court of Appeals denied Petitioner's timely petition for rehearing and Petitioner filed a petition for writ of certiorari in the Colorado Supreme Court. The petition for writ of certiorari raised two of the issues addressed by the Court of Appeals including the issue of lack of probable cause.

While the decision was pending on the petition for writ of certiorari Petitioner filed a supplemental citation of authority citing the decision of the Ninth Circuit Court of Appeals in *United States v. Clark*, 31 F.3d 831 (9th Cir.1994). The petition for writ of certiorari was denied on January 30, 1995.

Consideration of testimony presented at the hearing on the motion to suppress is helpful to an understanding of the importance of the issue presented in this petition and why it is critical that the decision of the Colorado Court of Appeals should not be allowed to stand. The testimony reveals that law enforcement officers acting on a mere hunch conducted an investigation that was at best superficial and cursory. The investigation revealed only evidence of non-criminal activity. If the Court of Appeals decision is allowed to stand law enforcement will be encouraged to conduct similar investigations.

Testimony at the hearing established that the investigation of the residence began late in the day on December 11,1990, when Deputy Haka approached Investigator Lindsey with a "gut suspicion" or "hunch" that something strange was going on at the residence. Lindsey spoke with Haka for approximately five

minutes. According to Lindsey, the basis of Haka's suspicion was (1) her observation of an unusual pattern of occupancy, (2) her belief that nobody lived at the house, and (3) her observation of a vehicle parked at the house in the morning that would leave soon after that and not return until the following morning. Haka did not indicate any specific time when the vehicle came and left other than it was "usually" in the morning. She was not specific about the number of times that she observed the vehicle and had not conducted any surveillance. Lindsey did not know how often Haka drove by the residence on patrol or how often she had made the observations and he did not ask her. Haka did not tell Lindsey of any efforts on her part to verify if anyone was living at the house.

The next day Lindsey spoke with Deputy Daines for approximately ten minutes. According to Lindsey, Daines corroborated Haka's information about the traffic patterns at the residence. In addition, Daines mentioned that there were heavy curtains on the windows and "may" have said that he never saw them open. Lindsey admitted that it was not unusual to see heavy curtains on the windows of houses in the area for insulation.

Deputy Haka testified that the house had been vacant for a period and she occasionally checked it. She then noticed that it was no longer vacant. She saw people who appeared to be living there. The activity around the house did not appear to change from the time that Deputy Haka first noticed that people had moved in until the search in December 1990. Petitioner took over the residence in October 1989. Accordingly, there was an approximately fourteen-month period during which Deputy Haka observed unchanged activity that suddenly aroused a "gut feeling" such that she contacted Lindsey with her "suspicions." Deputy Haka was unable to articulate any specific difference or change in the activity around the house that would account for her new found "hunch." Deputy Haka did not tell Lindsey that the

activity at the house was unchanged during the time she made her observations.

Deputy Haka also told Lindsey that there were people that appeared to be living at the house. She had seen two young men around the property. In Haka's words, "There was a young person living at the house." However, she never attempted to contact the persons she believed to be living at the house or to find out their identity before the execution of the warrant. She did not attempt to determine ownership of the vehicles she observed at the residence, did not conduct surveillance, and did not contact the neighbors.

Deputy Daines also told Lindsey that he had previously issued a traffic citation to Douglas Dunkin who gave the address of the house in question as his residence. Daines told both Haka and Lindsey before the execution of the search warrant that it was his impression that Dunkin was living at the residence based upon Dunkin having given him the address as his residence and observing the van Dunkin was driving at the time of the traffic ticket "always parked there" on a daily basis.

When Deputy Haka first reported her suspicions to Lindsey he told her to check the utility usage at the residence. Haka then asked Deputy Kit Morrow to get the information. Morrow reported to Haka simply that the usage was high and Haka reported this to Lindsey. Lindsey then contacted Dennis Williams at Intermountain Rural Electric Association (IREA) and requested information from the records of electrical usage at the residence for the period after Smith took over the residence. The information regarding electrical usage was incorporated into the affidavit.

Lindsey did nothing to corroborate the information he received from Haka and Daines. He conducted no surveillance of

the residence. He made no comparisons of the electrical bill of comparable residences in the same area. The residence in question was approximately 9,000 square feet and had an apartment unit. Lindsey simply checked the assessor's office and found that the property was assessed as a residence. He also drove by and observed no outward indication of a business at that location. Lindsey had driven by the house before to Haka told him of her suspicions and he had observed nothing unusual. He did not check the criminal records of the persons associated with the license plates of the vehicles observed at the house until after the execution of the warrant.

Before seeking the search warrant Lindsey contacted Rick Wallingford, an investigator in the District Attorney's office. The major focus of their conversation was the information about the electrical usage. According to Wallingford, high electrical usage is only one factor in an indoor cultivation investigation. In fact, Wallingford acknowledged that it would be improper to base an investigation solely on electrical usage. Other important factors include (1) the type and size of the structure, (2) the presence of exhaust fans, (3) the presence of outside power supplies, (4) the lifestyle of the individuals observed around the structure, (5) the identity of the owners of the vehicles observed around the structure, (6) coverings on the windows, (7) canvassing the neighborhood, (8) surveillance and the frequency of surveillance, and (9) the criminal record of persons associated with the structure. Furthermore, before concluding that a particular usage was unusually high, Wallingford believed that a comparison with the usage of other similar structures should be done. However, neither Lindsey nor Wallingford recalled discussing comparisons and no comparisons were done. Lindsey told Wallingford that the information provided by the other officers was only a "suspicion" and that he had no information from informants about any illegal activity at the residence. Lindsey had no specific information that marijuana was being grown at the residence. Wallingford

discussed explanations for the high electrical usage other than marijuana cultivation. Such activities include welding or sheet metal work, or growing plants other than marijuana.

REASONS FOR GRANTING THE WRIT

1. The decision of the Colorado Court of Appeals decided a federal question in a way that conflicts with the decisions of other state courts and a United States court of appeal.

2. The decision of the Colorado Court of Appeals decided an important question of federal law which has not been but should be settled by this court and decided a federal question in a way that conflicts with applicable decisions of this Court.

The opinion of the Colorado Court of Appeals was a case of first impression in Colorado on the issue of whether evidence of high electrical usage in the absence of any objective indicia of criminal activity is sufficient to establish probable cause to search.

The Colorado Supreme Court considered evidence of electrical usage in probable cause determinations in only one other case. In *People v. Quintana*, 785 P.2d 934 (Colo. 1990), the issue was whether under the *Gates* totality-of-the-circumstances test, *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), an informant's disclosures regarding criminal conduct were sufficiently corroborated so as to establish probable cause. The court pointed to records of unusual or high electrical usage along with other information that police were able to verify as providing corroboration of the informant's information. The court did not find that the unusual electrical usage provided the necessary probable cause.

Quintana is consistent with cases from other state

jurisdictions that have considered the factor of high electrical usage for purposes of probable cause in a search warrant affidavit. The cases stand for the proposition that high or unusual electrical usage may be used to corroborate other specific information regarding marijuana growing activity, most often information from an informant. However, high or unusual electrical usage in the absence of specific information about criminal activity does not constitute probable cause. *See State v. McBride*, 773 P.2d 379 (Or. App. 1989) (high electrical usage alone or in combination with boarded windows insufficient to establish probable case); *State v. Mason*, 728 P.2d 1325 (Id. App. 1986) (large discrepancy in electrical usage together with other information is ". . . no more indicative of criminal behavior than of common place occurrences consistent with normal legitimate behavior"); *State v. Huft*, 720 P.2d 838, 840 (Wash. App. 1986) (increased electrical usage merely corroborated innocuous facts and did not corroborate informant information; ". . . there are too many plausible reasons for increased electrical use to allow a search warrant to be issued based on increased consumption"); *State v. White*, 720 P.2d 873, 874-75 (Wash. App. 1986) (heavy foot and vehicle traffic, nonspecific suspicion of marijuana growing, covered windows, and twofold increase in power usage, insufficient to support probable cause; "Mere verification of innocent activity by the police is unilluminating as to any criminal activity"; ". . . the police investigation of the power wattage and the independent surveillance do not suggest criminal conduct."); *State v. McPherson*, 698 P.2d 563 (Wash. App. 1985) (anonymous information regarding marijuana growing, police investigation showing condensation on windows, potting soil near garage, plastic covering on windows, twofold increase in power consumption, insufficient to establish probable cause; ". . . a sharp increase in electrical usage in an ordinary residence is somewhat unusual but there are too many other plausible explanations for the increased energy use for that information to point to criminal activity."); *State v. Mickle*, 765 P.2d 331 (Wash.

App. 1988) ("A high electrical usage in and of itself is insufficient to establish grounds for issuance of a search warrant"); *see also, State v. Kluss,* 867 P.2d 247, 254 (Idaho App. 1993) ("High power usage may be caused by any one of numerous factors: hot tubs, arc welders, poor insulation, ceramic or pottery kilns, or indoor gardening under artificial lights.").

These state court cases establish that records of electrical usage at a residence which suggest that usage is unusually high or changed in an unusual way does not constitute probable cause to believe that criminal activity is occurring at the house. Nor does such information provide adequate independent corroboration of information known to law enforcement officers which rises to nothing more than a "gut feeling" or "hunch."

The federal cases that have considered evidence of high or unusual electrical usage in the determination of probable cause have reached decisions similar to the decisions at the state level especially, *United States v. Clark,* 31 F.2d 831 (9th Cir.1994). In *Clark,* law enforcement officers received two letters from an anonymous source claiming that the defendant was closely associated with a fugitive wanted for marijuana offenses. The letters contained no other information regarding marijuana cultivation or any other illegal drug activity. This information was included in an affidavit for search warrant along with general assertions about the characteristics of marijuana cultivators, most significantly the assertion that marijuana cultivators often have high electricity usage because of the need to provide light for growing plants. The affidavit set forth the defendant's electrical consumption usage and other factors implying that the electricity was being used for some purpose other than household heating.

In analyzing the probable cause issue the court first found that because the affidavit failed to establish any basis for concluding that the tip was reliable, the hearsay should be given

little or no consideration in evaluating probable cause. Next the court noted that the information in the affidavit provided no basis for the magistrate judge to evaluate whether the usage was high or unusual. The court then said that "Even assuming, however, that Clark's electrical consumption was ''high,' such consumption is consistent with numerous entirely legal activities. This evidence, which is equally consistent with both legal and illegal activity, coupled with an entirely uncorroborated anonymous tip, is simply not sufficient to establish probable cause for searching the home. We conclude that the affidavit was insufficient to support the magistrate judge's finding of probable cause." *Clark*, 31 F.2d at 835.[1]

Several federal decisions have relied on evidence of high or unusual electrical usage as corroboration of informant information. *See, e.g., United States v. Curtis*, 965 F.2d 610 (8th Cir. 1992) (informant information of marijuana being grown in a co-defendants basement corroborated by several anonymous calls reporting growing of marijuana at the residence, purchase of hydroponic growing equipment by defendant, and excessive electricity usage at the residence); *United States v. Broussard*, 987 F.2d 215 (5th Cir. 1993) (information from an unnamed cooperating individual that marijuana was being grown at a specific trailer belonging to the defendant, that confidential informant had observed marijuana and cultivation equipment at the trailer, and that defendant had cultivated marijuana hydroponically for several years corroborated by evidence that all of the trailer windows were blacked out, defendant had no job and seldom left the trailer, purchase of hydroponic growing equipment by occupants of the trailer, doubling of electrical

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1. The court refused to require that the evidence be suppressed. The court found that the searching officers' reliance on the search warrant was objectively reasonable. *United States v. Leon*, 468 U.S. 897, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1981). The prosecution in this case did not raise the issue of good faith in either the state trial or appellate courts.

usage during the height of the marijuana growing season and data from thermal imaging device showing more intense heat being emitted from defendant's trailer than others in the area); *United States v. Olson*, 21 F.3d 847 (8th Cir. 1994) (tip from an unknown informant that the defendant was cultivating marijuana in a mobile home corroborated by information from a reliable informant who reported similar activity, aerial surveillance, data from infrared thermal detection device indicating significant amounts of heat coming from within the mobile home unlike neighboring areas, venting system on the roof of the mobile home, comparison of electrical records with records of prior tenants showing defendants use to be 3-4 times higher then prior tenants).

There are no federal cases where evidence of high or unusual electrical usage in the absence of articulable objective indicia of criminal activity, usually informant information, has been held to be sufficient to establish probable cause to search. There are no cases where, as in this case, the unparticularized hunch or suspicion of a police officer has been raised to the level of probable cause simply on the basis of evidence of high or unusual electrical usage.

These state and federal cases are consistent with this Court's decisions regarding probable cause that reaffirm the fundamental notion that before a determination of probable cause can be made, there must be some specific articulable objective indicia of criminal activity. Probable cause may not be left to the subjective speculation of police officers engaged in the competitive business of ferreting out crime, whether those subjective speculations are asserted as reasons for a warrantless search or incorporated in an affidavit for search warrant.

In *Illinois v. Gates*, 462 U.S. 213,103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), this Court reaffirmed the totality-of-the-

circumstances test for determining whether an affidavit for a search warrant establishes probable cause. At the same time the Court reaffirmed that earlier cases illustrate the limits beyond which judges and magistrates may not go in finding probable cause. *Gates,* 462 U.S. at 239. Information must be presented to the judge or magistrate so that he or she can make an independent determination of probable cause and not merely ratiiy the suspicions, beliefs or conclusions of law enforcement officers. An affidavit must provide a substantial basis for determining the existence of probable cause. Mere conclusory statements are not sufficient, *see Nathanson v. United States,* 290 U.S. 41, 54 S. Ct. 11, 78 L. Ed. 2d 159 (1932); *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1968).

At its core probable cause requires some objective articulable indicia of criminal activity. *Beck v. Ohio,* 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); *see Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The objective information must be in sufficient detail to establish the required level of suspicion. *Spinelli v. United States,* 393 U.S. 410, 416, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). An inarticulable hunch or suspicion is insufficient. *See Terry,* 392 U.S. at 27, 88 S. Ct. at 1883.

Gates also discussed the role that corroboration plays in applying the totality of circumstances test. *See Draper v. United States,* 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959). Corroboration is not limited to information concerning acts that are criminal in nature. Corroboration of only non-criminal activity may support a finding of probable cause. The focus in reviewing an affidavit that relies on corroboration of non-criminal activity depends upon the degree of suspicion that attaches to the particular type of non-criminal activity. *Gates,* 462 U.S. at 243 n. 13, 103 S. Ct. at 2335 n. 13. *See also, People v. Leftwich,* 869 P.2d 1260 (Colo. 1994).

However, the approval of the use of corroboration of non-criminal activity presupposes that there are some objective articulable indicia of criminal activity. ". . . seemingly innocent activity [may become] suspicious in light of the initial tip." *Gates*, 462 U.S. at 243 n. 13. This is clear from a consideration of the facts in *Gates*, 462 U.S. 213.

In *Gates* the police received an anonymous handwritten letter that articulated a claim that Sue and Lance Gates were engaged in criminal activity. The investigation corroborated only non-criminal activity. The court found that the anonymous letter did not provide probable cause to searches the Gates' car our house. However, the corroboration of non-criminal activity was held to be sufficient to establish probable cause when considered in light of the initial tip.

It is fair to conclude that if the police in *Gates* had not had the information of criminal conduct articulated in the informant's letter and instead decided to investigate simply on a hunch that the Gates were involved in criminal activity, the information concerning the Gates' non-criminal activity would not have supported a finding of probable cause to search. In other words, corroboration of non-criminal activity will not elevate a mere hunch or suspicion into probable cause to search in the absence of some objective articulable indicia of criminal activity.

Application of the *Gates* totality of circumstances test to the circumstances of this case establishes that there was not a substantial basis for concluding that any illegal activity was occurring at the house, let alone that evidence of such activity would be found at the house. Here police had nothing more than an admitted hunch or suspicion and no specific objective articulable indicia of criminal activity. The investigation merely revealed non-criminal activity, *i.e.*, high electrical usage, which numerous courts have held is so vague and innocuous that it cannot supply probable cause.

If this case is allowed to stand, police can bootstrap a mere hunch or suspicion into probable cause based on nothing more than non-criminal activity.

> If vague, unverifiable allegations accompanied by verifiable innocuous facts can result in a warrant, the constitutional requirement that a search warrant only issue upon probable cause becomes a nullity.

Leftwich, 869 P.2d at 1268.

That is what occurred in this case. The police had no articulable suspicion of criminal activity at the residence. The investigation developed information of a non-criminal nature. The degree of suspicion attached to the non-criminal information was nil. "High power usage may be caused by any one of numerous factors: hot tubs, arc welders, poor insulation, ceramic or pottery kilns, or indoor gardening under artificial lights." *State v. Kluss*, 867 P.2d at 254. To allow a search warrant to issue on the basis of circumstances shown in this case would rendered the probable cause requirement a nullity.

CONCLUSION

Because this Court has not addressed the question whether evidence of high electrical usage in the absence of articulable objective indicia of criminal activity establishes probable cause and because the Colorado Court of Appeals opinion is contrary to decisions in other state and federal jurisdictions that have considered this issue, this Court should grant this Petition.

Respectfully submitted,

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Dated this 28th day of April, 1995.

APPENDIX A — OPINION OF THE COLORADO COURT OF APPEALS DATED MAY 5, 1994

COLORADO COURT OF APPEALS May 5, 1994
No. 93CA0325
No. 93CA0326

The People of the State of Colorado,
Plaintiff-Appellee,

v.

Lawrence Douglas Dunkin,
Defendant-Appellant,

and

The People of the State of Colorado,
Plaintiff-Appellee,

v.

Francis Joseph Smith,
Defendant-Appellant.

Appeal from the District Court of Park County
Honorable Kenneth M. Plotz, Judge
No. 91CR10
No. 91CR11

Division V JUDGMENTS AFFIRMED
Opinion by JUDGE RULAND
Hume and Casebolt, JJ., concur

Appendix A

Gale A. Norton, Attorney General, Stephen K. ErkenBrack, Chief Deputy Attorney General, Timothy M. Tymkovich, Solicitor General, Brian R. Whitney, Assistant Attorney General, Paul Koehler, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Law Office of Stanley H. Marks & Richard A. Hostetler, Richard A. Hostetler, Denver, Colorado, for Defendants-Appellants

In this consolidated case, defendants, Laurence Douglas Dunkin and Francis Joseph Smith, each appeal a judgment of conviction for cultivation of marihuana. We affirm.

Based on evidence provided in a sworn affidavit, a warrant was issued to search a residence owned by Smith and occupied by Dunkin. Pursuant to the search warrant, various incriminating items were found including sophisticated lighting, irrigating, and drying equipment used for growing marihuana, 334 marihuana plants, and written manuals relative to growing marihuana plants which had Smith's fingerprints on them.

Following the search, defendants were arrested and charged with cultivation of marihuana and other offenses. Smith later moved to suppress the evidence obtained in the search. Dunkin joined the motion. After hearing testimony and legal argument, the trial court denied the motion.

Defendants subsequently entered into an agreement with the prosecution which provided that all charges except cultivation of marihuana would be dismissed, that this charge would be tried to the court, and that if convicted, defendants would be sentenced to probation. After approving the parties' agreement, the trial; court found defendants guilty and sentenced them in compliance with the agreement.

Appendix A

On appeal, defendants challenge the denial of their motion to suppress the evidence seized from the residence on various grounds.

I.

The investigating officer who prepared the affidavit in support of the warrant relied in significant part upon the unusual amount of electricity used in the residence as reflected by a record of the monthly billings. This information was furnished by the rural electric association. Defendants first contend that because they had a reasonable expectation of privacy in these utility records, the investigating officer's conduct in obtaining the information constituted a search in violation of the Fourth and Fourteenth Amendments as well as Colo. Const. art. II, §§7 and 25. We are not persuaded.

In determining whether there was an unconstitutional "search" here, we must first consider whether defendants had a legitimate expectation of privacy in Smith's utility records. *People v. Hillman*, 834 P.2d 1271 (Colo. 1992). The legitimacy of that expectation of privacy depends, in turn, on whether defendants exhibited a subjective expectation of privacy in the records and whether that subjective expectation is one society recognizes as reasonable. *Hoffman v. People*, 780 P.2d 471 (Colo. 1989). The societal analysis, however, is based upon objective factors and requires an examination of the facts and circumstances in each case. *People v. Wieser*, 796 P.2d 982 (Colo. 1990).

We conclude that the acquisition of Smith's utility records did not constitute a search under either constitution.

Appendix A

A.

Under the federal constitution, the Supreme Court has determined that the Fourth Amendment does not prohibit investigating officers from securing information revealed to a third-party without a warrant even if the information is revealed in confidence and on the assumption that it will be used only for limited purposes. *See United States v. Payner*, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980); *Smith v. Maryland*, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). We are persuaded that this analysis extends to records maintained by a utility company regarding use of electricity in a particular structure. *United States v. Porco*, 842 F.Supp. 1393 (D. Wyo. 1994). Hence, we conclude that no violation of the federal constitution occurred when the investigating officer obtained the utility records for the structure. *See People v. Beckstrom*, 843 P.2d 34 (Colo. App. 1992).

B.

In construing the Colorado constitution, our supreme court has in some cases imposed more stringent constraints on police conduct than those imposed by the United States Supreme Court in construing the federal constitution. Relying upon *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) and *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (1980), defendants therefore contend that the Colorado constitution prohibits the search at issue.

Specifically, defendants maintain that use of electricity in a residence is indispensable and that, therefore, records of that usage may not be properly characterized as "voluntarily" disclosed by the occupants to the utility. As a result, defendants argue, their expectation that the utility will not disclose this information to investigating officers without a warrant is a

reasonable one which society also accepts as reasonable. We disagree.

In *Charnes v. DiGiacomo, supra*, our supreme court held that a bank depositor has a reasonable expectation of privacy in the bank records of his financial transactions and that these records are therefore protected from disclosure by this state's constitutional provisions relating to searches and seizures. There, the court's rationale was that because bank accounts are necessary to modern commercial life and because customers do not intend to disclose the substance of these financial transactions, the inadvertent disclosure of such information is incidental to the customer's major purpose of facilitating fund transfers and is, therefore, not a true disclosure to a third party that would vitiate the customer's right to privacy.

Subsequently, in *People v. Sporleder, supra*, our supreme court applied a similar rationale in concluding that pen register records of telephone calls dialed are also protected from disclosure under this state's constitution. There, the court noted that knowledge of telephone numbers dialed by an individual, as well as the date and time of each call, often yields inferential knowledge of the content of the conversations themselves. In addition, the *Sporleder* court reasoned that because telephone companies have not been insensitive to the confidentiality of this information, the defendant's expectation of privacy was a reasonable one.

Because of the nature of electrical use in a residence, however, we do not view either *Charnes* or *Sporleder* as dispositive of the issue here.

Research reveals that Idaho is the only other state to have

addressed the specific issue before us in the context of that state's constitution. In *State v. Kluss*, 867 P.2d 247, 254 (Idaho Ct. App. 1993), the court of appeals concluded that "the scope of protection afforded by Article 1, 17 of the Idaho Constitution does not extend to the individual power consumption records maintained by a utility" company because the defendant's expectation of privacy in such records was objectively unreasonable. The court reasoned that:

> In order to have electricity, Kluss was obliged to obtain the same from [the utility provider]. Kluss did nothing to create the records except consume power. The power records in the case at bar reveal only the amount of power usage. The power records were maintained by [the utility provider] in the ordinary course of business. They do not identify any activities of Kluss. On a comparative basis they may demonstrate that the power use at the Kluss home is greater or lesser than similar houses or at similar times or that the power use has increased or decreased at different times. The information does not provide any intimate details of Kluss's life, identify his friends or political and business associates, nor does it provide or complete a 'virtual current biography.' The power records, unlike telephone or bank records, do not reveal discrete information about Kluss's activities. High power usage may be caused by any one of numerous factors: hot tubs, arc welders, poor insulation, ceramic or pottery kilns, or indoor gardening under artificial lights.

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State v. Kluss, supra, 867 P.2d at 254.

Even if we assume that defendants held a subjective expectation of privacy in the utility records, we view the court's rationale in *Kluss* as persuasive in concluding that, under the Colorado constitution, society does not view this expectation of privacy as a reasonable one. *See also People v. Beckstrom, supra.* We find further support for this conclusion in the trial court's comment, which defendants do not challenge on appeal, that, unlike telephone and bank records, utility records can be obtained by other members of the public such as real estate salespersons or a prospective purchaser of a home. Therefore, the records are not protected from disclosure by Colo. Const. art. II, §§7 and 25.

Finally, we decline to adopt the "articulable suspicion" test posited by defendants based upon the decision of the supreme court of Washington in *In re Request of Rosier*, 717 P.2d 1353 (Wash. 1986). In that case, the court concluded that, pursuant to a state statute, law enforcement officers must have an articulable suspicion that a crime has been committed before making a request for utility records.

Aside from the fact that the *Rosier* court was interpreting a statute, we find no basis for superimposing this requirement upon the test enunciated by our supreme court under its prior decisions. *See People v. Sporleder, supra.*

Based upon the foregoing resolution of defendants' constitutional claim, it is unnecessary to address the prosecution's contention that Dunkin lacks standing to assert any constitutional violation.

Appendix A

II.

We also disagree with defendants' next contention that, even if we conclude that the utility records were obtained legally, the affidavit in support of the search warrant does not establish probable cause to search the residence.

In determining whether a warrant should issue, the magistrate need only decide whether, given all of the circumstances set forth in the affidavit, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *People v. Abeyta*, 795 P.2d 1324 (Colo. 1990). In this connection, due consideration should also be given to a law enforcement officer's experience and training in determining the significance of the officer's observations relevant to probable cause set forth in the affidavit. *Bartley v. People*, 817 P.2d 1029 (Colo. 1991).

Our duty as a reviewing court is to determine whether the magistrate had a substantial basis for concluding that probable cause existed. *People v. Leftwich*, P.2d (Colo. No. 93SA290, March 7, 1994). In this review, a magistrate's determination of probable cause is entitled to great deference and any doubts must be resolved in favor of that determination because of the constitutional preference for investigating officers to obtain warrants in lieu of pursuing some basis for warrantless searches. *See People v. Leftwich, supra; see also People v. Abeyta, supra; People v. Hill*, 690 P.2d 856 (Colo. 1984).

Here, the property at issue consists of a large residence containing living quarters in the rear and adjacent storage sheds. Three separate utility meters had been installed. The structure

had originally been constructed to house a retail store as well as living quarters.

The challenged affidavit recites that a deputy sheriff had reported to an investigator that "something strange was going on" at the residence because the only time the deputy observed any activity was when a vehicle pulled into the driveway in the morning and left about an hour later. According to the affidavit, it did not appear to this deputy that anyone was living in the structure.

The investigator interviewed a second deputy who lived near the residence. This deputy also noted that certain cars came to the residence in the morning and then left. The deputy also indicated that "there are heavy curtains covering the windows" and that, based upon the absence of lights at night, no one appeared to be living in the residence. However, the deputy also stated that he was not certain about whether the residence was occupied because of the number of tracks in the driveway.

The investigator contacted a representative of the rural electrical association who furnished information regarding electricity used at the residence, the living quarters, and the adjacent storage sheds for a 15-month period.

This information indicated excessive use of electricity for the residence which did not vary from summer to winter as would be anticipated with the use of electric heat. The meter reader for the association also confirmed that usage at the residence was "well above normal" to the extent that he marked his log to recheck the kilowatt hours in order to ensure that no mistake had been made.

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The affidavit reveals that the investigator discussed the foregoing information with a representative of the Drug Enforcement Agency and was advised that possible explanations for the usage would be an illegal drug lab or a marihuana growing operation. The investigator also discussed the information with an investigator for the district attorney's office with 18 years experience in drug enforcement.

This investigator was of the opinion that a marihuana growing operation was the most probable explanation. He explained the heavy curtains as precluding observation of the operation from outside the residence, the periodic occupation of the residence as indicating control of the plant growth, and the use of grow lights and water pumps as requiring heavy usage of electricity. Finally, this investigator pointed to a 4-month growth cycle of planting and harvesting marihuana as fitting a pattern seen in the monthly bills for the residence.

We therefore conclude that, when read in a practical, common sense fashion, the affidavit in this case provided sufficient evidence to establish probable cause to search Smith's residence. *See People v. Ball*, 639 P.2d 1078 (Colo. 1982).

III.

Defendants finally contend that the trial court erred in rejecting defendants' veracity challenge to the affidavit. Defendants argue that law enforcement officers either intentionally, recklessly, or negligently misstated or omitted information which made the affidavit substantially misleading. As a result, they assert, the magistrate was precluded from reaching a neutral and detached decision regarding the question of probable cause. We disagree.

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If a law enforcement officer includes a false statement in an affidavit intentionally or with reckless disregard for the truth, the statement must be stricken and the remaining allegations must be reviewed to determine whether probable cause exists. *People v. Young*, 785 P.2d 1306 (Colo. 1990). However, as pertinent here, if the erroneous statement is the result of the good faith mistake or negligence of an officer-affiant, appropriate sanctions need only be imposed at the discretion of the trial court. *People v. Flores*, 766 P.2d 114 (Colo. 1988).

On the other hand, *omissions* of adverse, material facts from an affidavit will only invalidate a search warrant if the affidavit is thereby rendered substantially misleading. *People v. Wilson*, 819 P.2d 510 (Colo. App. 1991).

Defendants assert that, although the affidavit conveys the impression that there was something suspicious about the activity, or lack of activity, around the residence, and that no one was living there, two of the deputies at the suppression hearing provided testimony that conflicted with statements they made earlier to the investigating officer. One of the deputies testified that she informed the officer before the affidavit was submitted that there were people who appeared to be living at the house. Another deputy testified that, based on an encounter he had with Dunkin prior to the execution of the search warrant, he believed Dunkin lived at the house. Neither of these facts appeared in the affidavit.

We conclude, that, although there was some inconsistency in the testimony and the affidavit regarding whether anyone was living at the residence, the trial court correctly determined that such inconsistencies were not sufficient to establish either that the officer or the informants made false statements intentionally

or that such statements were made with a reckless disregard for the truth. Indeed, the statements attributed to one of the deputies in the affidavit indicated that he was not certain whether the residence was occupied.

Defendants also assert that it was at least negligent, if not a reckless disregard for the truth, on the part of either the investigator or the affiant not to reveal in the affidavit alternative legal explanations for the high consumption of electricity.

We conclude, however, that the failure to list every possible reason for the high consumption is not a material omission which upon a common sense reading of the affidavit renders it substantially misleading. Given the other facts and observations stated in the affidavit, explaining the probable usage as connected to the growth of marihuana was warranted.

Therefore, we conclude the trial court did not err in failing to strike the challenged statements from the affidavit, and it properly denied the motion to suppress.

Accordingly, the judgments of conviction against defendants are affirmed.

JUDGE HUME and JUDGE CASEBOLT concur.

APPENDIX B — ORDER OF THE DISTRICT COURT, PARK COUNTY, COLORADO FILED SEPTEMBER 1, 1992

DISTRICT COURT, PARK COUNTY, COLORADO

Case No. 91CR11

ORDER DENYING MOTIONS TO SUPPRESS EVIDENCE

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

FRANK SMITH and DOUGLAS DUNKIN,

Defendants.

This matter comes before the Court upon the Defendants' motion to suppress evidence obtained pursuant to the execution of a search warrant. The Court conducted an evidentiary hearing on the matter which commenced on March 6, 1992. The matter was continued until June 12, 1992 and finally concluded on that date. The parties were given a period of time to file briefs outlining their positions in the matter However, only the Defendant Smith has chosen to do so.

Basically, the Defendants claim that the search of their electrical utility records, without a warrant, was a violation of their rights. Furthermore, they claim that there is no probable cause for a search warrant without the utility records, that there was not probable cause for believing the existence of the grounds upon which the warrant was issued, and, that the warrant was illegally executed.

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The Court must first determine whether or not the search of the defendants' electrical utility records was improper. "Whether the contested activities constitute a search depends on whether the officer's actions intruded upon an activity or area in which the defendant held a legitimate expectation of privacy." *People v. Hillman,* No. 91SC591, Decided July 20, 1992; 16 Brief Times Reporter 1315, citing *People v. Wiser,* 796 P.2d 982 (1990). "Whether an asserted expectation of privacy is legitimate depends an objective factors, not on the individual's subjective expectations." *People v. Juarez,* 770 P.2d 1286 (1989).

It is important to note that the *Hillman* Court, in deciding that a person did not possess an expected right to privacy in garbage placed near a public sidewalk, found a distinction between that factual situation and the one in *People v. Sporleder,* 666 P.2d 135, and *Charnes v. DiGiacomo,* 612 P.2d 1117 (1980), dealing with telephone and bank records. In a similar manner, the present case is also distinguishable from *Sporleder, Charnes,* and even *Hillman.* Here, the implications for personal privacy that troubled the dissenters in *Hillman* barely exist. The use of electricity or other utilities, alone, do not objectively lead one to conclusions about the "activities, behavior, habits, and lifestyles" of persons who use those resources. *Hillman,* (dissent of Justice Quinn), supra.

In this case, the Park County Sheriff's Deputies examined the Defendants utility records without a warrant and without probable cause. This Court however notes that unlike telephone and bank records these records are often accessible to members of the public. For example, a local real estate salesman or even a prospective purchaser would merely need to phone the local utility office to get such information.

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Therefore, the Court finds that the Defendants did not have a reasonable expectation of privacy in such utility records. Therefore the seizure of such records by law enforcement officers did not constitute a search under our Constitution.

The Defendants also claim that the facts contained in the affidavit for a search warrant contained misstatements that the officers knew or reasonably should have known to be false. They claim that probable cause does not exist when the disputed statements are excised from the affidavit. For the most part, the Defendant Smith argues that the officers made contradictory statements to Smith's investigator and while testifying during the evidentiary hearing.

In reviewing the totality of the evidence and the affidavit, the Court finds that the Defendant(s) have not met their burden in this veracity challenge. Although the statements in the affidavit are, at times, not exactly consistent with the Affiants' testimony or other extra-judicial statements, such statements can not be labeled by this Court as perjurious or having a reckless disregard for the truth. *People v. Dailey,* 639 P.2d 1068, (1982).

The remaining claims of the Defendants do not constitute sufficient cause for suppression of evidence.

It is therefore ordered that the motions to suppress evidence are denied.

Done this 31st day of August, 1992.

BY THE COURT:

s/ Kenneth M. Plotz
Kenneth M. Plotz, Judge

Appendix B

cc: Thorson
Hostetler
Tyler

APPENDIX C — ORDER OF THE COURT OF APPEALS OF THE STATE OF COLORADO DATED JULY 7, 1994

THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 93CA0325 and 93CA0326

ORDER

PEOPLE V LAWRENCE D. DUNKIN AND PEOPLE V. FRANCIS J. SMITH

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. It is ordered that issuance of the Mandate is stayed to and including August 08, 1994 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:

Ruland, J.

Hume, J.

Casebolt, J.

DATED: July 07, 1994

APPENDIX D — ORDER OF THE SUPREME COURT, STATE OF COLORADO FILED JANUARY 31, 1995

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC478
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA0325 & 93CA0326
DISTRICT COURT, PARK COUNTY, 91CR10 & 91CR11

LAWRENCE DOUGLAS DUNKIN and FRANCIS JOSEPH SMITH,

Petitioners,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

ORDER

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JANUARY 30, 1995

cc: Richard A. Hostetler
1733 High Street
Denver, CO 80218

Appendix D

Paul Koehler
Assistant Attorney General
Criminal Enforcement Section

Honorable Kenneth M. Plotz
Park County Courthouse
P.O. Box 190
Fairplay, CO 80440

Clerk of the District Court
Park County Courthouse
P.O. Box 190
Fairplay, CO 80440

Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX E — SEARCH WARRANT, AFFIDAVIT AND COMPLAINT FOR SEARCH OF PROPERTY, AND AFFIDAVIT FOR SEARCH WARRANT

IN THE COMBINED COURTS
COUNTY OF PARK **SEARCH WARRANT**
STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO

TO: THE SHERIFF, UNDERSHERIFF, DEPUTY SHERIFFS, AND ALL LAW ENFORCEMENT OFFICERS AUTHORIZED TO EXECUTE SEARCH WARRANTS IN THE STATE OF COLORADO, GREETINGS:

WHEREAS, Charles Lindsey, has made an affidavit and complaint for the issuance of a Search Warrant.

AND WHEREAS, the affidavit of the applicant seems proper and it appears that probable cause exists for the issuance of a Search Warrant for the reason or reasons marked with an "X" below:

The property to be searched for, and seized if found is:

( ) Stolen or embezzled OR

(X) Designed or intended for use or which is or has been used as a means of committing a criminal offense or the possession of which is illegal OR

(X) Would be material evidence in a subsequent criminal prosecution.

WE THEREFORE COMMAND YOU, with the necessary

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and proper assistance to enter and search, A large green house located at 4844 Park County Road 43, on Unit 1 of Deer Creek Valley Ranchos near the intersection with Vigilante Ave. Including the apartment, office and attached pole barn, and both stories of the house, but not including the self storage garages on the property. The house is 4.8 miles in on Park County Road 43 from Colorado Highway 285, on the right side of the road.

and you will search for, Equipment or materials used in the cultivation of marijuana, records and paperwork indicating ownership of the property or materials on the property, and any paperwork concerning distribution including but not limited to lists of names, and illegal substances such as marijuana.

and if the same or any part thereof is found, that you seize the goods and things found and safely keep them until further Order of this Court or until they are admitted into any criminal proceedings by a Court of this State; and that you further file a report with this Court inventorying the goods and things which were found and seized or reporting that nothing was so found and seized.

DONE this 13th day of December, 1990.

BY THE COURT:

s/ illegible
JUDGE

Appendix E

IN THE COMBINED COURTS
COUNTY OF PARK
STATE OF COLORADO

AFFIDAVIT AND COMPLAINT FOR SEARCH OF PROPERTY

The undersigned, being duly sworn, deposes and swears:

1. That this affidavit is made in support of an application for a Search Warrant to search: A large green house located at 4844 Park County Road 43, on Unit 1 of Deer Creek Valley Rachos near the intersection with Vigilante Ave. Including the apartment, office and attached pole barn, and both stories of the house, but not including the self storage garages on the property. The house is 4.8 miles in on Park County Road 43 from Colorado Highway 285, on the right side of the road.

2. That the property to be searched for, and seized if found is (Mark "X" according to fact):

( ) Is stolen or embezzled OR

(X) Is designed or intended for use or which is or has been used as a means of committing a criminal offense or the possession of which is illegal, OR

(X) Would be material evidence in a subsequent criminal prosecution.

3. The following additional facts are submitted in support of this application:

(see typewritten Affidavit attached hereto Marked Exhibit "A" and made a part hereof by this reference.)

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4. The property to be searched for is: Equipment or materials used in the cultivation of marijuana, records and paperwork indicating ownership of the property or materials on the property, and any paperwork concerning distribution including but not limited to lists of names, and illegal substances such as marijuana.

NOW WHEREFORE, the Applicant moves this Court for the issuance of a Search Warrant of the above named address or location for the search and seizure of the above described property.

s/ Charles Lindsey
Charles Lindsey, Applicant
Investigator, Title

STATE OF COLORADO)
) ss.
COUNT OF PARK)

The foregoing affidavit and complaint was subscribed and sworn to before me this 13 day of December, 1990.

BY THE COURT:

s/ illegible
JUDGE

Appendix E

STATE OF COLORADO)
)SS
COUNTY OF PARK)

AFFIDAVIT FOR SEARCH WARRANT

In support of a request for the issuance of a search warrant to search:

The Large Green house located at 4844 Park County Road 43, on Unit 1 of Deer Greek Valley Ranchos near the intersection with Vigilante Ave. Including the apartment, office and attached pole barn, and both stories of the house, but not including the self storage garages on the property. The house is 4.8 miles in on PCR 43 from Colorado Highway 285, on the right side of the road.

The undersigned Affiant, being duly sworn upon oath, deposes and says:

1) On 121190 Park County Deputy Haka called my attention to the above described house. She said it appeared something strange was going on at the house because the only time there was any activity around the house was when a vehicle would pull into the driveway in the morning, and would then leave about an hour later. It appeared to her that no one was actually living at the house.

2) On 121290 I talked to Park County Deputy Daines who lives near the house. He told me he has noticed that different cars come to the house in the morning and then leave. He observed this in the last month. He also told me that there are heavy curtains covering the windows of the house. He said it appears to him that no one is living at the house as he has

never seen lights on at the house at night, but he is not sure of this as there are a lot of tracks in the driveway next to PCR 43 indicating that someone goes in and out of the driveway everyday.

3) On 121290 I talked to Dennis Williams of Intermountain Rural Electric Association who serves the area with electricity. Williams told me that the house showed an unusually large consumption of electricity. Williams told me there are three meters at the location, one for the main house, one for an apartment at the house and one for some storage garages. The apartment and storage bills appear to be normal according to Williams. All of the accounts are in the name FRANK J. SMITH with a social security number of 546 66 2457. Williams told me about the following bills for the main house. All the billing periods end on the 24th of the month.

MONTH	KILOWATT HOURS	DOLLARS
1190	11000	865.50
1090	5250	405.65
0990	8440	650.57
0890	7193	554.83
0790	10297	793.15
0690	6393	493.40
0590	7608	586.69
0490	7150	551.53
0390	8022	618.48
0290	4124	319.19
0190	3253	252.32
1209	4640	358.81

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1089	3599	427.47
1089	1900	148.00
0939 (est)*	2099	162.00

* September of 1989 was only billed for half a month so bill is estimate of full months bill.

Williams told me that Smith opened the account on September 11, 1989 and that in his experience, the first two bills reflect normal usage for the house. The rest of the months show excessive use for a house and also do not vary from winter months to summer months in a pattern that Williams said he would expect if electric heat was being used. This would still not explain the amount of electricity used at the house. Williams also told me that there have not been any delinquent bills on the account and Smith has never questioned the amount of the bills on the house, according to Williams records.

4) I also talked to the Intermountain Rural Electric Association meter reader for the house, Fred R. Ahr. Ahr told me that in his experience the electric usage at the house is well above normal for that type of house and in fact he noted it on his log so that the kilowatt hours used would be rechecked to make sure there was no mistake about the usage. He checked his log and found an entry for the house in August of 1988 which showed 741 kilowatt hours were used at the house by a previous owner. Ahr said he has seen cars at the house, but never has seen anyone around the house, or any dogs at the house.

5) On 121290 I talked to Kent Florence of the Drug Enforcement Administration and he told me he also found the electric use at the house to be way above normal. He told

me possible explanations for the use would be an illegal drug lab or marijuana growing operation. He told me that weapons are commonly found in connection with these operations.

6) On 121290 I checked at the Park County Assessor's Office and found that FRANK J. SMITH had purchased the property at 4844 PCR 43 on September 11, 1989. The house was originally built as a store but is now listed by the assessor's office as a residence. According to the plan in the folder, there is a 50 by 32 foot open area in the house and the living quarters are in the apartment at the rear of the building.

7) On 12139 I talked to Deputy Daines and he told me he had been watching the house that evening. There was a blue Ford Van parked at that house when he started watching the house, but there were no signs of any activity in the house. At about 1:30 AM he saw a dark blue Toyota pickup truck in the yard that had not been there before. This vehicle was still at the house at 8 AM this morning. I found that Smith has four vehicles registered with the Park County Clerks Office, including two Toyota pickup trucks. The Blue van registers to Smith also.

8) On 121390 I talked to District Attorney Investigator Wallingford. He has 18 years experience in law enforcement, was trained by the Drug Enforcement Administration and is an instructor with them on marijuana growing operations, has 330 hours of advanced training and has participated in numerous operations involving marijuana growing operations. I told him what I had found about the house and in his opinion it is most likely a

marijuana growing operation. He told me the purpose for the heavy curtains on the windows is so no one can look in to see what is going on in the house and to keep out outside light to control the plant's growth with indoor light sources. Periodic occupation of the house would be normal in a growing operation because if the operation is automated, it needs to be checked occasionally to be sure it is running correctly, but does not need constant monitoring. The use of grow lights and water pumps for an automatic watering system would use a lot of electric power. Also the plants grow in a four month cycle of planting and harvesting, which fits a pattern seen in the bills. The low bills at the beginning also fits the pattern of a growing operation as it can take two months to set up the operation. Wallingford told me all of the above patterns or observations fit with what he has found in marijuana growing operations he has seen in the past.

9) In my investigation of the house I have come across no indications of any activity open to the public or business being conducted legally at the location that would explain the amount of electricity being used at the house.

Therefore your affiant respectfully requests that a search warrant be issued for the property described at the beginning of this affidavit located at 4844 PCR 43 near Bailey, Colorado, to search for marijuana, equipment or materials used in the cultivation of marijuana, paperwork indicating ownership and use of the premises and any equipment on the premises on materials, and any paperwork indicating distribution including, but not limited to lists of names.

Further affiant sayeth naught.

Appendix E

s/ Charles Lindsey
Investigator Charles Lindsey

Subscribed and sworn to before me this 13 day of December, 1990.

s/ illegible
Judge